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Attorneys for Defendants Sheriff Joseph Arpaio
9 and Maricopa County Attorney Bill Montgomery

10 IN THE UNITED STATES DISTRICT COURT

11 FOR THE DISTRICT OF ARIZONA

12 United Food & United Food &
13 Commercial Workers Local 99, et al.,

14 Plaintiffs,

15 and

16 Arizona Education Association, et al.,

17 Plaintiff-Intervenors,

18 v.

19 Ken Bennett, in his capacity as Secretary of
20 State of the State of Arizona, et al.,

21 Defendants.

NO. CV 11-0921 PHX-GMS

**DEFENDANTS ARPAIO AND
MONTGOMERY'S MOTION TO
DISMISS FOR FAILURE TO
PROSECUTE**

22
23 Pursuant to Federal Rule of Civil Procedure 41(b), Defendants Maricopa County
24 Sheriff Joseph Arpaio and County Attorney Bill Montgomery move this Court to dismiss

1 Plaintiffs' Second Amended Complaint and Plaintiff-Intervenors' First Amended
2 Complaint. Plaintiffs and Plaintiff-Intervenors have done nothing to prosecute their case
3 against Montgomery and Arpaio as required by Rule 41(b).

4 **I. LAW**

5 Rule 41(b) specifically provides that the failure of the plaintiff to prosecute his
6 claim is grounds for involuntary dismissal of an action. This requires "prosecution with
7 'reasonable diligence' if a plaintiff is to avoid dismissal." *Anderson v. Air West, Inc.*,
8 542 F.2d 522, 524 (9th Cir. 1976) (citing *Ballew v. Southern Pacific Co.*, 428 F.2d 787
9 (9th Cir. 1970); *States Steamship Company v. Philippine Air Lines*, 426 F.2d 803 (9th
10 Cir. 1970)). And the Ninth Circuit Court of Appeals "has consistently held that the
11 failure to prosecute diligently is sufficient by itself to justify a dismissal, even in the
12 absence of a showing of actual prejudice to the defendant from the failure." *Id.* (citing
13 *Alexander v. Pacific Maritime Ass'n*, 434 F.2d 281 (9th Cir. 1970); *Pearson v. Dennison*,
14 353 F.2d 24 (9th Cir. 1968). "The law presumes injury from unreasonable delay." *Id.*
15 "Even if the plaintiff has an obviously strong case, dismissal would be appropriate if the
16 plaintiff has clearly ignored his responsibilities to the court in prosecuting the action and
17 the defendant had suffered prejudice as a result thereof." *Id.* at 526.

18 **II. ARGUMENT**

19 Other than generically naming Arpaio and Montgomery in the Complaints, no
20 steps have ever been taken to prosecute this case against either of them. Neither has
21 been involved in any discovery. In the Sheriff's December 2011 Initial Disclosure
22 Statement, he confirmed that he had neither any witnesses nor documents. Neither was
23
24

1 involved in any of the motions for preliminary injunction. Neither was involved in any
2 of the motions and cross motions for summary judgment. And even the recent
3 stipulation to extend the deadlines, apparently signed off on by all other parties (*see* Dkt
4 #195), completely bypassed Arpaio and Montgomery—tacitly admitting that their
5 involvement is unnecessary.

6 Since the inception of this case approximately two years ago, undersigned
7 counsel confirmed that Arpaio and Montgomery did not intend to take any formal
8 position on the constitutionality of SB 1363. And to date, neither have. If the Court
9 declares parts of SB 1363 to be constitutional, those will be enforced. But if it or any of
10 its separate parts are found to be unconstitutional, the Sheriff and County Attorney will
11 not enforce them. It's that simple.

12 Outlining the above, undersigned counsel again recently asked all Plaintiffs and
13 Plaintiff-Intervenors to voluntarily dismiss Arpaio and Montgomery on May 15, 2013.
14 *See* Exhibit A. Sadly, all 15 counsel failed to respond—reaffirming their ongoing failure
15 to prosecute. The law requires “reasonable diligence” in prosecuting one’s case. But
16 Plaintiffs and Plaintiff-Intervenors have exercised no diligence in prosecuting their
17 claims against Arpaio and Montgomery.

18 Arpaio and Montgomery would be severely prejudiced if forced to participate in
19 the upcoming Final Pretrial Conference set next month and the upcoming trial after
20 Plaintiffs and Plaintiff-Intervenors have taken no steps to prosecute their case against
21 Arpaio and Montgomery in the last two years. As repeatedly confirmed by Ninth Circuit
22 Court of Appeals, Rule 41(b) requires a dismissal in this circumstance.

1 **III. CONCLUSION**

2 Plaintiffs and Plaintiff-Intervenors have failed to exercise “reasonable diligence”
3 in prosecuting their case against Arpaio and Montgomery. And Rule 41(b) now requires
4 a dismissal.

5 RESPECTFULLY SUBMITTED this 13th day of June 2013.

6 WILLIAM G. MONTGOMERY
7 MARICOPA COUNTY ATTORNEY

8 BY: /s/ J. Scott Dutcher
9 J. SCOTT DUTCHER
10 ANN THOMPSON UGLIETTA
11 Attorneys for Defendants Sheriff Joseph
Arpaio and Maricopa County Attorney Bill
Montgomery

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13 CERTIFICATE OF SERVICE

14 I hereby certify that on this 13th day of June 2013, I caused the foregoing
15 document to be electronically transmitted to the Clerk’s Office using the CM/ECF
16 System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF
registrants.

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18 /s/ Lea Wink

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